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LEGAL DEVELOPMENT OF THE UNIVER-
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THE LEGAL DEVELOPMENT
OF
THE UNIVERSITY OF NORTH CAROLINA

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February 1965

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The Legal Development of The University of North Carolina

Introduction

The purpose of this paper is to analyze the legal authority of the Board of Trustees of The University of North Carolina to manage the internal affairs of The University, and the extent to which the General Assembly has enacted legislation tending to impair or override that authority. It is a summary review and analysis of the North Carolina constitutional and statutory provisions pertaining directly and especially to the establishment, organization, functions, and management of The University of North Carolina from 1789 to 1965. No notice has been taken here of the many state statutes (e.g., the Executive Budget Act and the State Personnel Act) which apply to The University in common with other state agencies and institutions or of biennial appropriation acts, although those enactments are necessarily a part of the legal framework within which The University exists.

Establishment of The University

The Constitution of North Carolina adopted in 1776 provided in Section 41

That a School or Schools shall be established by the Legislature for the Convenient Instruction of Youth with such salaries to the Masters paid by the public as may enable them to instruct at Low prices; and all useful Learning shall be duly encouraged and promoted in one or more Universities.

The General Assembly of 1789, by chapter 20 of the laws of that session,¹ entitled "An Act to establish a University in this State", declared forty

1. Iredell, Laws of the State of North Carolina 673 (1791).

persons named in the Act to be ". . . a Body politic and corporate, to be known and distinguished by the Name of The Trustees of the University of North-Carolina . . ."; granted the Trustees perpetual succession, the right to use a seal, the power to receive money and property for the use of the University, to hold property in trust for the University, to convey property, to sue and be sued, and to solicit subscriptions; and provided that the Trustees " . . . in general shall and may do all such Things as are usually done by Bodies corporate and politic, or such as may be necessary for the Promotion of Learning and Virtue."² The Trustees were empowered to elect persons to fill vacancies occurring in their number.³ They were directed, when they should deem the funds in hand sufficient, to select and purchase a site and to erect buildings thereon for the University.⁴

The charter further provided in Sec. VIII

That the Trustees shall have the Power of appointing a President of the University, and such Professors and Tutors as to them shall appear necessary and proper, whom they may remove for Misbehavior, Inability or Neglect of Duty; and they shall have the Power to make all such Laws and Regulations for the Government of the University and Preservation of Order and good Morals therein, as are usually made in such Seminaries, and as to them may appear necessary; provided the same are not contrary to the unalienable Liberty of a Citizen, or to the Laws of the State. And the Faculty of the University, that is to say, the President and Professors, by and with the Consent of the Trustees, shall have the Power of conferring all such Degrees or Marks of literary Distinction, as are usually conferred in Colleges or Universities.⁵

By Chapter 21 of the laws of the 1789 session, the General Assembly granted to the University all claims due the State up to January 1, 1783 and yet unpaid, and all property which had escheated or might thereafter escheat.

2. N.C. Laws 1789, ch. 20, §§ I and II. N.C. GEN. STAT. § 116-3 currently codifies the last-quoted language, omitting the words "shall and".

3. N.C. Laws 1789, ch. 20, § VI.

4. N.C. Laws 1789, ch. 20, § VII.

5. N.C. Laws 1789, ch. 20, § VIII.

Chapter 20 of the Laws of 1789 did not create a state agency or institution in the modern sense, with only such powers as were expressly granted to it. The General Assembly created a corporation by the only mode then available -- legislative act. The legal creature, the "Body politic and corporate", was "The Trustees of the University of North-Carolina". In addition to the powers given them to elect successor trustees by co-optation and to provide for the financing and the management of the business affairs of the Corporation, the Trustees were granted

. . . the Power to make all such Laws and Regulations for the Government of the University and Preservation of Order and good Morals therein, as are usually made in such Seminaries, and as to them may appear necessary; provided the same are not contrary to the unalienable Liberty of a Citizen, or to the Laws of the State.

In this act, the General Assembly was following a course similar to that followed at that time in the establishment of municipalities, non-profit corporations, and even private business corporations.⁷ The legislative charter stated the general purposes of the enterprise and granted the corporation broad powers for its achievement. The same pattern was followed a few years later in establishing "the Trustees of the Western College of North-Carolina".⁸

It is pertinent here that subsequent compilations of the public laws of the State usually did not reprint the charter of the University until 1883.⁹ The charter and other acts pertaining to the internal organization of the Board of Trustees and the management of the University were treated, for purposes of codification, as were municipal and private corporate charters.

6. N.C. Laws 1789, ch. 20, § VIII.

7. See, e.g., N.C. Laws 1817, ch. 52 (incorporating the Town of Hookerton); N.C. Laws 1819, ch. 105 (incorporating the New Salem Library Society); N.C. Laws 1790, ch. 26 (incorporating the Dismal Swamp Canal Company).

8. N.C. Laws 1820, ch. 17.

9. See, e.g., Haywood, A Manual of the Laws of North Carolina (1819); The Revised Statutes of the State of North Carolina, vol. I (1837); Revised Code of North Carolina (1855); Battle's Revisal of the Public Statutes of North Carolina (1873).

They were, for example, printed in Volume II of The Revised Statutes of the State of North Carolina at 424-34 (1837), along with other such charters. Certain acts regulating activities near the University (e.g., selling intoxicants to students and horse racing) were codified as public laws, since they were criminal statutes directed at persons not connected with the University. Certain of the statutes on escheats were also codified because of their application to persons and interests (e.g., executors and administrators of estates) outside the University.

Legislation from 1790 to 1868

Legislation adopted by the General Assembly from 1790 until 1868 dealt with a variety of topics pertaining to the University, but it is significant that (with one late and arguable exception) those acts did not seek to control the management of the internal affairs of the University, the charter having committed that responsibility to the Trustees.

Several acts dealt with escheated and confiscated property, which throughout this period constituted the only public endowment of the University.¹⁰ The Trustees were authorized to conduct a lottery to raise funds for the University.¹¹

Other acts dealt with the mode of selecting and number of University Trustees and the conduct of business at board meetings.¹²

Beginning in 1794, several statutes were enacted regulating or prohibiting certain activities off the University campus but in or near Chapel Hill,

10. N.C. Laws 1791, ch. 352; N.C. Laws 1794, ch. 405; N.C. Laws 1800, ch. 548; N.C. Laws 1801, ch. 571; N.C. Laws 1804, ch. 659; N.C. Laws 1805, ch. 677; N.C. Laws 1809, ch. 763; Revised Code of North Carolina, ch. 113, §11 (1855).

11. N.C. Laws 1801, ch. 573.

12. N.C. Laws 1798, ch. 512; N.C. Laws 1804, ch. 647; N.C. Laws 1805, ch. 678; N.C. Laws 1807, ch. 734; N.C. Laws 1821, ch. 1098; N.C. Laws 1824, ch. 1251.

in the hope of protecting the morals of the students from external corruption. All of these statutes were directed primarily at persons not connected with the University and at off-campus activities, over neither of which the Trustees had control. These regulatory statutes dealt with billard and other gaming tables, horse races, cockfights, elections and electioneering, theatrical performances, the sale of intoxicating beverages to students, and contracts of students with local merchants (which were declared void).¹³

No attempt was made until 1867 to alter the powers of the Trustees, granted by the charter of 1789, to govern the internal affairs of the University. By Public Laws of 1866-67, ch. 2, however, the General Assembly transferred to the Trustees of the University the land scrip which had been given the State under the Morrill Act,

Provided, That the University shall comply with the Act of Congress and make its leading object to teach such branches of learning as are related to Agriculture and the Mechanic Arts, without excluding other scientific studies and including Military Tactics.

The act went on to instruct the Trustees to dispose of the land scrip and use the proceeds to engage two additional professors to teach agriculture and the mechanic arts. It was also provided that the county court of each county could send one student to the University each year, free of charge for tuition and room rent. Despite the apparently mandatory terms of this act, it appears that the Trustees had the option of refusing to receive the land scrip and accept the conditions that went with it, but in those distressed times, the option probably was illusory.

13. N.C. Laws 1794, ch. 429; N.C. Laws 1823, ch. 1191; N.C. Laws 1824, ch. 1252; N.C. Laws 1827, ch. 4; The Revised Statutes of the State of North Carolina, ch. 116, §§ 2 through 5 (1837); Revised Code of North Carolina, ch. 113, §§ 8 through 10 (1855).

Constitution of 1868

The Constitution of 1868 attempted a drastic revision of many aspects of the governmental and political life of North Carolina. It established a government decidedly more democratic than that created by the previous Constitution. It placed the first restraints on the power of the legislature in several areas -- local government, the court system, and education among them. It called for the establishment of a variety of penal and charitable institutions by the State, and directed the General Assembly to ". . . provide by taxation and otherwise for a general and uniform system of Public Schools, wherein tuition shall be free of charge to all the children of the State between the ages of six and twenty-one years."¹⁴ And it declared that

The University of North Carolina with its lands, emoluments and franchises, is under the Control of the State, and shall be held to an inseparable Connection with the Free Public School System of the State.¹⁵

A State Board of Education was established, consisting of the Governor, Lieutenant-Governor, and six other elective state executive officers, ex officio.¹⁶ That Board was given power to make rules and regulations for the free public school system and educational fund of the State, subject to amendment or repeal by the General Assembly.¹⁷ It elected the Trustees of the University, one per county, for overlapping eight-year terms.¹⁸ Members of the State Board of Education and the President of the University were made ex officio members of the Board of Trustees of the University, and with three other Trustees appointed by the Board of Trustees, they constituted the Executive Committee of the Board of Trustees.¹⁹ The Governor was made

14. N.C. CONST. art. IX, § 2 (1868).

15. N.C. CONST. art. IX, § 5 (1868).

16. N.C. CONST. art. IX, § 7 (1868).

17. N.C. CONST. art. IX, § 9 (1868).

18. N.C. CONST. art. IX, § 13 (1868).

19. N.C. CONST. art. IX, § 14 (1868).

President of the Board of Education, President of the Board of Trustees, and Chairman of the Executive Committee of the Board of Trustees, all ex officio.²⁰

The effect was to put the Board of Trustees and thus the University largely beyond legislative control. Since the legislature did not then appropriate funds for the support of the University, even budgetary control was absent.

The Constitution went on to provide that

All the privileges, rights, franchises and endowments heretofore granted to, or conferred upon, the Board of Trustees of the University of North Carolina by the Charter of 1789, or by any subsequent legislation, are hereby vested in the Board of Trustees, authorized by this Constitution, for the perpetual benefit of the University.²¹

Thus the new Board assumed the authority of its predecessor in the management of University affairs. Section 16 of the Constitution of 1868 provided that

As soon as practicable after the adoption of this Constitution, the General Assembly shall establish and maintain, in connection with the University, a Department of Agriculture, of Mechanics, of Mining and of Normal Instruction.²²

Section 6 directed that

The General Assembly shall provide that the benefits of the University, as far as practicable, be extended to the youth of the State free of expense for tuition; also, that all the property which has heretofore accrued to the State, or shall hereafter accrue from escheats, unclaimed dividends or distributive shares of the estates of deceased persons, shall be appropriated to the use of the University.²³

20. N.C. CONST. art. IX, §§ 8, 14 (1868).

21. N.C. CONST. art. IX, § 15 (1868).

22. Now N.C. CONST. art. IX, § 10.

23. Now N.C. CONST. art. IX, § 7.

Legislation from 1868 to 1873

The only legislation passed with respect to the University during the period 1868-1873 pertained to escheats and unclaimed property²⁴ and the election of trustees.²⁵

Constitutional Amendments of 1873

When the Conservatives gained control of the General Assembly in 1870, they put through the General Assemblies of 1871-72 and 1872-73 and obtained popular ratification of eight constitutional amendments, perhaps the most important of which sought to restore the University to legislative control.²⁶ The provisions of the Constitution of 1868 declaring the University to be ". . . under the Control of the State. . ." and binding it to ". . . an inseparable Connection with the Free Public School System of the State . . ." were repealed, and members of the State Board of Education lost both their ex officio membership on the Board of Trustees and their authority to elect other University trustees. The substance of Article IX, § 15 of the Constitution of 1868 was rewritten in 1873 to read as follows:

The General Assembly shall have power to provide for the election of trustees of the University of North Carolina, in whom, when chosen, shall be vested all the privileges[,] rights, franchises and endowments heretofore in anywise granted to or conferred upon the trustees of said University; and the General Assembly may make such provisions, laws and regulations from time to time, as may be necessary and expedient for the maintenance and management of said University.²⁷ (Emphasis added.)

Note especially the emphasized portion of the section quoted above.

The charter of 1789 had granted the Trustees authority to make regulations

24. N.C. Pub. Laws 1868-69, ch. 113, § 76; N.C. Pub. Laws 1871-72, ch. 138, § 50.

25. N.C. Pub. Laws 1868, ch. 13 (requiring that no trustee be elected for a county of which he was not at the time a resident).

26. N.C. Pub. Laws 1872-73, ch. 86.

27. Now N.C. CONST. art. IX, § 6.

for the government of the University, ". . . provided the same are not contrary to the unalienable Liberty of a Citizen, or to the Laws of the State . . .";²⁸ however, that reservation of legislative authority was much less explicit in its terms and authoritative in its form (whatever the difference in its practical effect) than that contained in the 1873 amendment.

The 1873 amendment left intact the 1868 provisions concerning low tuition, escheats, and the establishment of ". . . a Department of Agriculture, of Mechanics, of Mining and of Normal Instruction . . .", which now appear as Article IX, Secs. 7 and 10 of the Constitution.

Legislation from 1873 to 1965

Since 1873, there has been no amendment of any of the constitutional provisions pertaining to the University. Thus it becomes pertinent to determine how the General Assembly has exercised its powers with respect to the University in the intervening 92 years, and the policy implications to be drawn from that evidence.

The General Assembly of 1873-74, implementing the 1873 constitutional amendment giving the General Assembly the power to provide for the election of trustees of the University, provided that there should be 64 trustees, elected by joint ballot of the General Assembly for overlapping eight-year terms, ". . . in whom, when chosen, shall be vested all the rights, privileges, franchises and endowments thereof, in any wise granted to or conferred upon the trustees of said University."²⁹ That act further provided that

[T]he board of trustees shall have power to make such rules and regulations for the management of the University as they may deem necessary and expedient not inconsistent with the constitution and laws of the State.³⁰

28. N.C. Laws 1789, ch. 20, § VIII.

29. N.C. Pub. Laws 1873-74, ch. 64, § 1 (copied from the 1873 constitutional amendment).

30. N.C. Pub. Laws 1873-74, ch. 64, § 4 (codified without change as N.C. GEN. STAT. § 116-10).

That act empowered the Board of Trustees to appoint from their own number an executive committee, ". . . clothed with the powers delegated to the executive committee under preceding organization of the University."³¹

The Code of North Carolina (1883) (for the first time since 1820) codified as public law the charter of the University as amended to that time, plus all other laws pertaining to the University then current.³² The several codes from 1883 forward have purported to include all of the statute law pertinent to the University as of the dates of their publication.

Legislation enacted from 1873 to 1965, like that of 1790 to 1873, has dealt primarily with escheats and unclaimed property, which were assigned to the University;³³ with the number and election of trustees and filling vacancies among their number;³⁴ with the regulation of liquor and gambling in the vicinity of the University;³⁵ with the issuance of revenue bonds to finance capital improvements on the campuses of The University;³⁶ with traffic regulation on campus;³⁷ and with biennial appropriations.³⁸

31. N.C. Pub. Laws 1873-74, ch. 64, § 5; cf. N.C. GEN. STAT. § 116-11.

32. The Code of North Carolina §§ 2610 through 2649 (1883).

33. N.C. Pub. Laws 1874-75, ch. 236; Code § 2629 (1883); N.C. Pub. Laws 1920, (Ex. Sess.), ch. 43; N.C. Pub. Laws 1937, ch. 400; N.C. Pub. Laws 1939, chs. 22, 29; N.C. Sess. Laws 1947, chs. 494, 614, 621; N.C. Sess. Laws 1953, chs. 1202, 1205; N.C. Sess. Laws 1957, chs. 1049, 1051, 1105.

34. N.C. Pub. Laws 1873-74, ch. 64; N.C. Pub. Laws 1876-77, ch. 121; N.C. Pub. Laws 1883, ch. 124; N.C. Pub. Laws 1891, ch. 98; N.C. Pub. Laws 1907, ch. 838; N.C. Pub. Laws 1909, ch. 432; N.C. Pub. Laws 1917, ch. 47; N.C. Pub. Laws 1931, ch. 202; N.C. Pub. Laws 1937, ch. 139; N.C. Pub. Laws 1941, ch. 136; N.C. Sess. Laws 1943, ch. 175; N.C. Sess. Laws 1963, ch. 448.

35. N.C. Pub. Laws 1879, ch. 232; N.C. Pub. Laws 1880 (Ex. Sess.), ch. 45; N.C. Pub. Laws 1893, chs. 398, 449; N.C. Pub. Laws 1931, ch. 41.

36. N.C. Sess. Laws 1961, ch. 1078 (N.C. GEN. STAT., ch. 116, art. 3A); N.C. Sess. Laws 1963, ch. 847 (N.C. GEN. STAT., § 116, art. 21).

37. N.C. Sess. Laws 1947, ch. 1070 (N.C. GEN. STAT. § 116-44.1); N.C. Sess. Laws 1961, ch. 1192 (N.C. GEN. STAT. § 116-186).

38. Beginning with N. C. Pub. Laws 1881, ch. 141.

Several acts deserve brief mention for such light as they may shed on the General Assembly's attitude toward the exercise of its powers to regulate the internal affairs of the University.

The General Assembly of 1887 directed the Trustees to reduce tuition in the University to \$60 a year.³⁹ That act was repealed in 1925, and it was provided instead that the Trustees should fix tuition in the amount they should think best.⁴⁰

The General Assembly of 1947 directed the Trustees to apply the interest and earnings from escheated or derelict property ". . . for maintenance and/or for scholarships and loan funds to worthy and needy students, residents of this State, attending the University of North Carolina"⁴¹

In 1945, the General Assembly "authorized" the Board of Trustees to expand the Medical School of the University into a standard four-year medical school.⁴² In 1963, the 1945 act was repealed, its purpose having been accomplished.⁴³

Legislation enacted in 1947 "directed" the Board of Trustees to establish a Dental School in conjunction with the Medical School.⁴⁴ That provision was repealed in 1963, its purpose having been accomplished.⁴⁵

39. N.C. Pub. Laws 1887, ch. 233.

40. N. C. Pub. Laws 1925, ch. 256; cf. N.C. GEN. STAT. § 116-143, 144.

41. N.C. Sess. Laws 1947, ch. 614 (N.C. GEN. STAT. § 116-26).

42. N.C. Sess. Laws 1945, ch. 1096.

43. N.C. Sess. Laws 1963, ch. 448.

44. N.C. Sess. Laws 1947, ch. 503.

45. N.C. Sess. Laws 1963, ch. 448.

The consolidation act of 1931⁴⁶ declared the Board of Trustees of the University to be ". . . a body politic and corporate, to be known and distinguished by the name of 'The University of North Carolina'". That act vested in that body politic and corporate ". . . all the powers, privileges, authority, and duties now imposed upon the trustees of the University, as it now exists" and also ". . . all the rights, privileges, duties, and obligations now by law, or otherwise, enjoyed by or imposed upon the existing University of North Carolina, the North Carolina State College of Agriculture and Engineering, and the North Carolina College for Women."⁴⁷ Thus the Board, as reconstituted in 1931, succeeded to the full legal and constitutional character the Board of Trustees had acquired since 1789 as the governing authority of the University at Chapel Hill.⁴⁸

In the recodification of the public statutes effected by the adoption of the General Statutes of North Carolina in 1943, several of the provisions with respect to the University were eliminated or abbreviated. Among the provisions eliminated was the provision, since 1789 a part of the University charter, reading:

They [the Trustees] shall have the power to make all such laws and regulations for the government of the university and preservation of order and good morals therein as are usually made in such seminaries, and as to them may appear necessary, provided the same are not contrary to the inalienable liberty of a citizen or to the laws of the state.⁴⁹

46. N.C. Pub. Laws 1931, ch. 202.

47. N.C. Pub. Laws 1931, ch. 202, § 4.

48. North Carolina State College and the North Carolina College for Women having been entirely creatures of statute and without specific constitutional foundation, the General Assembly had prior to 1931 acted with greater freedom in statutorily specifying their functions than had been the case with the University at Chapel Hill.

49. The North Carolina Code of 1939, § 5796.

No intention of withdrawing any part of the regulatory power of the Board is necessarily to be implied from that repeal, however, for the 1873-74 act⁵⁰ still in force adequately sets forth the same power in almost the same words. The repeal appears to have been merely a part of a general effort to eliminate conflicting and duplicating provisions of the statutes.

The Higher Education Act of 1963⁵¹ repealed virtually all individual assignments of functions to the three campuses of The University and substituted therefor the general statement of functions now codified as N.C. Gen. Stat. § 116-15. Under N.C. Gen. Stat. § 116-10 and other general powers of the Board of Trustees, that Board has ample power to define, distribute, and redistribute the functions of the several campuses of the University ". . . as they may deem necessary and expedient"

Conclusion

This summary recital of the constitutional and legislative history of the University of North Carolina leads to two conclusions:

First, although the Board of Trustees has always had broad authority to manage the University, the General Assembly also has extensive authority, reserved to it by the Constitution, Article IX, § 6, to ". . . make such provisions, laws, and regulations from time to time, as may be necessary and expedient for the maintenance and management of the University." While the legislative authority with respect to the University is not unlimited,⁵² the law and the Constitution give few clear indications as to where the limits lie.

Second, the General Assembly has, from 1789 forward, followed with remarkable consistency a policy of refraining from legislating on matters

50. N.C. GEN. STAT. § 116-10 (see page 9, above).

51. N.C. SESS. LAWS 1963, ch. 448.

52. University v. Foy, 5 N.C. 58 (1805).

which were within the competence of the Board of Trustees, and virtually all of those instances where it has so acted have been repealed.

This policy of legislative restraint has been followed despite what at times has doubtless been a strong temptation to override the authority of the Board of Trustees and legislate upon the internal affairs of The University. Threatened yieldings to such temptation (as in the case of the evolution controversy of the 1920's) almost uniformly have been turned back in the legislature.

The General Assembly has recognized in practice that, whatever its potential powers of "management" over The University, here it was not dealing with a mere creature of statute, carrying out an ordinary administrative function of the State and therefore properly subject to close and detailed legislative regulation. By the very act creating and setting apart The University as a body politic and corporate, since confirmed by constitutional provision, the General Assembly recognized the special nature and function of a public university in a free society -- to serve not only as the conservator, enlarger, and transmitter of man's store of knowledge, but to act as well as the critic of the society of which it is a part, reminding that society of its nobler ends and helping in their achievement, pointing up its shortcomings and aiding in their remedy. One of the vital duties of the Board of Trustees, a duty which requires a large measure of discretion, authority, and responsibility, is not only to guide The University but to guard it against the designs of those who would bend it to the service of small or partisan causes or silence its critical voice and so frustrate one of its chief purposes. And the Supreme Court of North Carolina, in declaring that ". . . under the constitution and statutes of this State, the management of the University of North Carolina is delegated to and vested in its Board of

Trustees . . . ,"⁵³ has given clear recognition to this special function of The University and this special duty of the Board of Trustees.

53. In re Carter, 262 N.C. 360, 370 (1964) (emphasis added).



